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UNITED STATES DISTRICT COURT
CLARK COUNTY, NEVADA

| | | |
|-------------------------------|---|-------------------------------------|
| THE UNITED STATES OF AMERICA, |) | CASE NO. 2:17-cr-110-APG-DJA |
| |) | |
| Plaintiff, |) | JOINT MOTION FOR NEW TRIAL |
| |) | BASED UPON NEWLY DISCOVERED |
| vs. |) | EVIDENCE; and SUPPLEMENTS TO |
| |) | PREVIOUSLY SUBMITTED MOTION |
| SYLVIANE WHITMORE, LARRY |) | FOR NEW TRIAL/JOINDER |
| MCDANIEL, |) | |
| |) | |
| Defendants. |) | |

COME NOW, the Defendants, SYLVIANE WHITMORE, by and through her counsel, Lisa A. Rasmussen, Esq. and Defendant LARRY MCDANIEL, by and through his counsel, Daniel Hill, and hereby submit their Joint Motion for New Trial Based Upon Newly Discovered Evidence as well as their individual Supplement(s) to the previously filed Motion for New Trial (McDaniel) and respective Joinder (Whitmore). This Motion is made and based upon the attached Memorandum of Points and Authorities, the papers and pleadings on file in this case and the attached Exhibits and Declarations. A hearing is requested if the Court believes a

hearing would further assist in ruling upon this Motion.

Dated: April 15, 2022

The Law Offices of Kristina Wildeveld & Associates

/s/ Lisa A. Rasmussen

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MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

Defendants Sylviane Whitmore (Ms. Whitmore) and Larry McDaniel (Mr. McDaniel) were indicted, along with Phillip Hurbace, on June 27, 2017.^{1 2} (ECF 36.) This matter proceeded to trial in June 2021 with the jury returning guilty verdicts against all three defendants on most counts, save some not submitted to the jury. (ECF 225-227.) Thereafter, Mr. McDaniel filed a motion for new trial and Ms. Whitmore joined the Motion. (ECF 230,231.)

On September 8, 2021, the court openly filed a letter it had received that was signed

¹ This is a Superseding Indictment, and it is not known when the initial indictment was filed because it is sealed.

² Sylviane Whitmore was a government witness in United States v. Wetselaar and Litwin, case number 2:11-cr-347 KJD. The Wetselaar trial concluded on March 23, 2017 and it appears that the government waited until after the conclusion of that trial to apprise either defendant of the Indictment. The fact of Ms. Whitmore's indictment by the Nevada US Attorney's Office was not disclosed to Wetselaar and/or Litwin until December 2017 and the disclosure was made orally at a forfeiture proceeding for Mr. Litwin.

“Toda Raba.” (See ECF 239 and Exhibit 1, attached hereto.) The letter is anonymous as “Toda Raba” is a Hebrew phrase meaning “thank you very much.” (See Exhibit 2.) The cover letter portion that is signed Toda Raba is typewritten and it states that the author is elderly, is not able to travel, but believes he/she is doing what is morally right after having seen news coverage of the trial and the convictions.³ Attached to the anonymous typewritten letter is a hand printed confession of Elliot Shaikin, the former owner of 24/7 Private Vaults, confessing to both the 2012 robbery and the 2014 burglary with which both Mr. McDaniel and Ms. Whitmore are charged. Not only does the Shaikin’s confession implicate him, it also implicates Hurbace as having participated in both events with him (Shaikin). It exonerates Mr. McDaniel and Ms. Whitmore from both incidents and states that Hurbace wanted to blame the employees. This confession forms the basis for this Motion for New Trial, and it will be discussed in much greater detail below, and it will be corroborated by other newly discovered evidence. It will also be discussed in the context of other evidence that while not newly discovered, was not known to this Court because prior counsel and these defendants lacked the confession of Elliot Shaikin prior to their trial.

At a hearing on October 5, 2021, this Court determined that it would grant a new trial for both Ms. Whitmore and Mr. McDaniel on Count 8 and that it would entertain further briefing on whether Count 9 (against Mr. McDaniel) was implicated in that ruling as are his other counts of conviction and whether a new trial on Ms. Whitmore’s other counts should also be given a new trial based on this Court’s ruling on Count 8. These defendants are of the opinion that the newly discovered evidence warrants a new trial on all counts of conviction for reasons that will be explained herein, but they have nonetheless also addressed the issues the court where the court was interested in seeing additional briefing.

³ There was news coverage of the verdicts in the Las Vegas Review Journal. See [Insiders convicted of stealing more than \\$1M from vault | Las Vegas Review-Journal \(reviewjournal.com\)](#) There was also coverage of the Indictments and the business in general leading up to the trial. See: [Las Vegas crime: Vault robbery left customers missing millions | Las Vegas Review-Journal \(reviewjournal.com\)](#); [Jury to decide whether break-ins at Las Vegas vault were inside jobs | Las Vegas Review-Journal \(reviewjournal.com\)](#); .

1 **II. The Standard for Granting a Motion for New Trial**

2 Ms. Whitmore and Mr. McDaniel are entitled to a new trial pursuant to Federal Rules of
3 Criminal Procedure Rule 33, which permits the Court to grant a new trial based on newly
4 discovered evidence. To obtain a new trial based on newly-discovered evidence, a defendant
5 must show that (1) the evidence is newly discovered and was unknown to him at the time of the
6 trial; (2) the evidence is material, not merely cumulative or impeaching; (3) the evidence will
7 probably result in an acquittal; and (4) the failure to learn of the evidence sooner was not the
8 result of a lack of diligence. *See United States v. Davis*, 960 F.2d 820, 824-25 (9th Cir. 1992)
9 (quoting *United States v. Walgreen*, 885 F.2d 1417, 1428 (9th Cir. 1989)).

10 **III. The Toda Raba Letter**

11 1. The Cover Letter

12 The letter is written on July 30, 2021, but is not mailed until September 2, 2021, per its
13 postmark. This is either indicative of someone who waited to be sure they were doing the right
14 thing before mailing it, someone who did not have easy access to mail, or someone who
15 possibly gave it to someone else to mail from a certain location. It is post-marked Las Vegas,
16 Nevada, but the content of the letter also states, “I do not wish to be involved more please,” “I
17 am elderly and not with good health,” and “I cannot travel.” Exhibit 1, page 1.

18 It is clear from the letter that the person was aware of the outcome of the trial because it
19 states, “Upon reading of the court proceedings in the private vault company crimes I feel it
20 necessary and appropriate to make public now information I have regarding such events.” Id.
21 The author goes on to state that she/he has possessed these documents since 2014 when Shaikin
22 entrusted them to him/her in the final days before his death, but that he/she felt that it was
23 nobody’s business until now. Id.

24 The author states that he/she knew Elliot and his wife Ella well, that he tried hard and
25 that he would not admit failure. Id. It also implores those to whom it was sent, which appear to
26 be not only the court, but also the government, but to “others with knowledge,” to do the right
27 thing and to make the story right. Id. The author also included other documents to corroborate
28

1 that he/she actually knew Shaikin and included corroborating documentation of that. That
2 corroboration is discussed below in subsection (3) of this section. Id.

3 2. The Confession

4 The confession of Shaikin states the following on the first page:

5 “On my death bed I confess I robbed the vaults with Phil Hurbace in 2012 & 2014
6 because I lost too much money there. The Customers were scum! Elliot Shaikin.”

7 “What can they do to me now?”

8 Id. at page 3.

9 On the second page, it states:

10 “Phil wants to call crime tip line & blame employees. They were not involved. Police
11 are stupid! Elliot.”

12 Id. at page 4.

13 On a third portion below this second statement the confession states:

14 “Before I die – I hid \$ from 2012 in L units, we broke in to bankrupt business to get \$
15 out[.] Fuck 24/7 and Shapiro.”

16 Id.

17 Shaikin clearly states that he and Hurbace were responsible for both the 2012 incident as
18 well as the 2014 “break in” and that he had money from the 2012 robbery that he hid in the L
19 vaults and that he needed to break into the “bankrupt business” to get the “\$ out.” This is
20 completely consistent with all of the evidence, which will be discussed further below in section
21 V. Id. at 3,4. Further, Shaikin states that the employees were not involved, and he completely
22 exculpates any employee except Hurbace. Id. Shaikin died in September of 2014, long before
23 the FBI began its investigation in January 2015 and long before the Indictments were known to
24 these defendants or anyone other than the U.S. Attorney’s Office for the District of Nevada
25 (July 2017.) He had no incentive to protect Whitmore or McDaniel from a prosecution that did
26 not happen until almost three years after his death. As he states in his confession, the
27 “customers were scum,” he “lost too much money there,” and he robbed the vaults with “Phil
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1 Hurbace in 2012 & 2014.” Id. He adds that the “Police are stupid,” and “Fuck 24/7 and
2 Shapiro.” Id. He makes certain to state that the employees were not involved. Id.

3 The confession of Shaikin to both events is newly discovered and it not only inculpat
4 Shaikin and Hurbace, it exculpates Ms. Whitmore and Mr. McDaniel. It was not known to
5 either defendant prior to trial and could not have been discovered prior to trial. As is discussed
6 below, these movants are having a difficult time locating the person who sent this letter to the
7 Court, and the person appears to have undertaken great lengths to remain anonymous but is
8 trying to do the right thing and probably believed that the letter would be sufficient. The
9 confession is actually sufficient, as is discussed below in subsection (4).

10 3. The Corroborating Documents Sent to the Court

11 The author of the Toda Raba letter sent other documents to inform the Court that he/she
12 knew Shaikin well and had access to other documents belonging to Shaikin as a means of
13 corroborating that he/she was close to Shaikin and that Shaikin would have entrusted this person
14 with his confession. Included in the package sent to the court is a photograph of Elliot Shaikin
15 and his wife Ella Burns. Id., at page 3. This is indeed a photo of Elliot Shaikin as can be seen
16 from the photograph in the Las Vegas Review Journal, second link in footnote 3, *supra*, where
17 the caption comments on his signature “suspenders,” also seen in the photograph attached to the
18 Toda Raba letter.

19 Also included in the Toda Raba letter are an invoice from local Channel 8 for
20 advertising dated December 31, 2013 and an undated typewritten letter describing Shaikin’s
21 company’s 50-year ground lease that is signed by him. Id., at pages 5 and 6.

22 The advertising invoice provides some additional handwritten notes purportedly from Shaikin
23 and the ground lease letter provides a signature purportedly of Shaikin. Presumably the author
24 of the Toda Raba letter sent these documents to corroborate his writing, his signature and that
25 he/she has business records belonging to Shaikin and would be a person entrusted with a dying
26 confession.

27 ...
28

1 4. The Expert Report Confirming that This is Shaikin's Handwriting

2 The undersigned had a forensic document examination expert, Jan Seamen Kelly,
3 examine the confession to determine whether or not the handwriting belongs to Shaikin. A copy
4 of the handwriting expert's report is attached hereto as Exhibit 2. The documents examined
5 consist of Exhibit 1, pages 3 and 4, otherwise referred to herein as "the confession." Exhibit 2,
6 page 1. The known documents provided to the Ms. Seamen Kelly were sourced as follows:

7 Item 3 Received by Lisa Rasmussen from Shawn Perez, Shaikin's civil attorney.

8 Item 4 Received by Lisa Rasmussen from Shawn Perez, Shaikin's civil attorney.

9 Item 5 ECF 239, the anonymous Toda Raba letter.

10 Item 6 Received by Lisa Rasmussen from Shawn Perez, Shaikin's civil attorney.

11 Item 7 Received by Lisa Rasmussen from Shawn Perez, Shaikin's civil attorney.

12 Item 8 Included in bank records produced in criminal case discovery.

13 Item 9 Received by Lisa Rasmussen from Shawn Perez, Shaikin's civil attorney.

14 Item 10 Received by Lisa Rasmussen from Shawn Perez, Shaikin's civil attorney.

15 Item 11 Received by Lisa Rasmussen from Shawn Perez, Shaikin's civil attorney.

16 Item 12 Included in bank records produced in criminal case discovery.

17 See Declaration of Lisa Rasmussen.

18 The conclusion of Ms. Seamen Kelly's analysis is "Elliot Shaikin is the writer of the
19 hand printed entries on the two questioned documents listed as Items 1 and 2." Exhibit 2 at
20 page 3. Items 1 and 2, the questioned documents, are the confession. See attachments to
21 Exhibit 2, 9th and 10th pages of the PDF. The confession was written by Shaikin. The expert
22 report confirming this was received by the undersigned in December 2021 and is newly
23 discovered.

24 5. Efforts to Locate the Author thus Far

25 Ms. Rasmussen has undertaken extensive efforts to locate the author of the Toda Raba
26 letter. See Declaration of Lisa Rasmussen. This includes multiple conversations with the
27 Bankruptcy Trustee, multiple conversations with Shawn Perez, Shaikin's former civil counsel,
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1 attempts to speak to Kent Berkley, his bookkeeper, hiring an investigator to interview
2 neighbors from Shaikin's Sun City Summerlin neighborhood, asking persons of the local Jewish
3 community if they knew Elliot Shaikin, obtaining Shaikin's cell phone records via subpoena
4 and having the investigator isolate potential authors of the anonymous letter, sending an
5 investigator to locate one of Shaikin's daughter to interview her in person, and going to meet
6 with one neighbor in Sun City, along with the investigator. Id. As of this time, we are unable to
7 determine who authored the anonymous letter but are still making attempts to determine who
8 may have written the letter. While it is not necessary to know who mailed the confession to the
9 court, it would be helpful to know, and the undersigned are still working on additional
10 investigation. Id.

11 **IV. The Audio Tape of Shaikin Corroborating That He Planned the April 14,**
12 **2012 Event**

13 In November 2021, Mr. McDaniel found an audio cassette tape in a box in his garage
14 that he had long believed his mother had thrown out. See Declaration of Larry McDaniel. The
15 audio tape a conversation between Shaikin and Mr. McDaniel that Mr. McDaniel recorded
16 because he felt Shaikin was bullying him about working a shift he could not work. Id. He used
17 his mother's cassette player/recorder to record the conversation, which he put on speaker. Id.
18 The undersigned had the conversation converted to digital format and "trimmed" from the
19 cassette for better preservation and also had an audio expert reduce as much background noise
20 as possible. See Declaration of Lisa Rasmussen and Declaration of Walter Marin, an audio
21 specialist. The undersigned also asked the audio specialist to check the relevant portion for any
22 evidence of splicing or any other irregularities that would indicate that it was not an authentic
23 recording and Mr. Marin did not find any evidence of any such thing. A digital copy of the
24 trimmed audio recording is provided to the court and to counsel on a flash drive as Exhibit 3.
25 The original audio cassette is in Mr. Marin's possession and is available for examination should
26 the government wish to examine the original from which the trimmed, digital version was
27 created. Ms. Rasmussen also prepared a transcript of the conversation, which is attached hereto
28

1 as Exhibit 4. It reads as follows:

2 First 1.5 seconds, music playing

3 **Elliot Shaikin:** Totally _____ (unintelligible)

4 **Larry McDaniel:** Okay Elliot, I just put you on speaker phone. So just to clarify,
5 you said you want me to work Karen's shift on April 14th and
6 that's a Saturday morning, right?

7 **Elliot:** The 14th at 2:00?

8 **Larry:** Right.

9 **Elliot:** Yes.

10 **Larry:** And there is something important you need me for on the morning of the
11 14th?

12 **Elliot:** There is. We have a problem. If you want the damn truth, most of our
13 customers, well look around you, they are frightening, we have a lot of
14 scum today that damn place is not safe.

15 **Larry:** Okay.

16 **Elliot:** Funny thing, you want what you need. Think about the vaults, cash,
17 gold, its there and I came up with which boxes to go to, 30 boxes of ugly
18 nasty customers without proof, without recourse of any type.

19 **Larry:** Elliot if I didn't know better I'd say you've been hooked up with that low
20 life locksmith again, the one that broke in the boxes a few years ago,
21 what's his name?

22 **Elliot:** Oh yeah, Phil?

23 **Larry:** Yeah, Phil.

24 **Elliot:** I don't know, maybe.

25 **Larry:** Oh God. Well first of all Elliot I think you're crazy, okay. And when it
26 comes to cash and gold, my parents put away plenty of it over the years.
27 Now, I can't work that early shift because I can't leave my mother home
28 alone and I'm not going to do something that would endanger her, so I'm

1 not doing this.

2 **Elliot:** No, I don't know, that's not acceptable.

3 **Larry:** Oh really.

4 **Elliot:** My advice, if you don't want it, keep this private.

5 **Larry:** Elliot, hello? He hung up.

6 Exhibit 4.

7 The recording was made prior to April 14, 2012. The only time that April 14th falls on a
8 Saturday is in 2012 and 2018.⁴ The next time April 14 will fall on a Saturday will be in 2019.
9 Shaikin died in September 2014, so the only time this conversation could have taken place
10 while Larry McDaniel was employed by 24/7 was prior to April 14, 2012. Mr. McDaniel
11 recalls that the conversation was between mid-March 2012 and the very beginning of April
12 2012. See Declaration of Larry McDaniel. Saturday was in fact Kerin Schroeder's scheduled
13 shift, from 2 am to 10 am. See Exhibit 24, Voluntary Statement Excerpt.

14 The voice is Elliot Shaikin because Mr. McDaniel refers to him as Elliot. Exs. 3 and 4.
15 Furthermore, the voice matches Shaikin's voice in other known recordings such as his bench
16 trial. See Exhibit 3, flash drive also containing known excerpts from Shaikin's bench trial.
17 The bench trial recording was provided by the government as discovery in this case. See
18 Declaration of Lisa Rasmussen.

19 The audio recording of the conversation with Shaikin and McDaniel corroborates
20 Shaikin's confession that he and Hurbace committed and/or planned the 2012 robbery. Shaikin
21 wanted Mr. McDaniel to work that night and Mr. McDaniel refused. He also refused to play a
22 part in what he believed was Shaikin's plan to come in with Hurbace and drill boxes. See
23 Declaration of McDaniel. McDaniel looked for the audio tape prior to his polygraph but was
24 not able to find it. Id. He believed that his mother had in fact thrown it away and that it was
25 forever lost. He located it in November 2021. It is newly discovered because he did not know
26 that he had it until November. See Id., and Declaration of Lisa Rasmussen. See also
27

28

⁴ [Months and Years having Saturday the 14th \(timeanddate.com\)](http://timeanddate.com)

1 Declaration of investigator Tom Dillard. See also Exhibit 25, Zia Records Receipt and Exhibit
 2 3 (flash drive), Zia Records video recording.

3 V. **Various Civil Case Documents Further Corroborating Shaikin's Motive and**
 4 **Means to Commit Both the 2012 and 2014 Events**

5 There are many items of evidence that further corroborate Shaikin's confession, and his
 6 recorded statements made prior to April 14, 2012. While these items addressed below are not
 7 newly discovered,⁵ they were not presented at trial because they lacked context, meaning or
 8 corroboration absent the Toda Raba letter with Shaikin's confession and absent the audio
 9 statements.

10 a. Deposition of Shaikin in December 2013 in the Burns Case

11 In 2012 Bradley and Lori Burns sued Shaikin and Sovereign Security Systems, Inc. over
 12 the loss of money and jewelry and other valuables from their rented box at 24/7 Private Vaults.
 13 The case was filed in the Eighth Judicial District Court, case number 12-A-673822-C. Shaikin
 14 was deposed on December 13, 2013 by counsel for the Burns, Michael Lynch. See Exhibit 5,
 15 Deposition Transcript. Shaikin testified that the alarm and the cameras were "remotely
 16 disconnected." Id., page 49. Here are some other examples of his testimony on this topic:

17 Q. So how would it be possible theoretically to disable the alarm without being
 18 inside the building?

19 A. Sir, they can disable computers from a distance.

20 Q. But your computer wasn't hooked up to the Internet was it?

21 A. Yes.

22 Id., page 61.

23 Q. It would have been impossible for them to break in had they not disarmed your
 24 system remotely prior to entering through the drywall?

25 A. That's correct.

26 Id., page 62.

27
 28 ⁵ The deposition transcript from Burns v. Shaikin, 24/7 was acquired by the undersigned within the last 30 days, but it certainly could have been obtained by trial counsel had trial counsel had a reason to hunt it down.

TSI was the alarm company. Shaikin testified that only he had the safe word:

Q. Is it fair to say that the password for TSI – the safe word- was “Wolf”?

A. Yes.

Q. So if TSI called the store –

A. The employee would not have it. I had it mostly.

Id., page 65. Shaikin knew his security system because “I put the system in.” Id., page 85. The system was disarmed “prior to” the robbery. Id., page 95.

b. 341 Meeting of Creditors Testimony

Shaikin was also questioned, under oath, by Bankruptcy Trustee Brian Shapiro.⁶ See Exhibit 6, Transcript of Meeting of Creditors pursuant to section 341. The corporate name for 24/7 Private Vaults is Sovereign Security Systems, Inc. Id., page 1. Shaikin formed the company in 1999 and was its sole owner. Id., page 10. The company filed its bankruptcy petition on January 10, 2014. Id., page 4.

When questioned by Michael Lynch, counsel for the Burns (creditors in the civil suit), he was asked about his profits:

Q. I see you made considerable money over the past few years in gross receipts. How much of that was spent in overhead?

A. All of it.

Q. Pardon?

A. All of it. Advertising, marketing, promotions, TV, radio.

Q. So you spent all of your income on advertising and employee –

A. And then the rent and the employees and taxes.

Q. When is the last –

A. So –

Q. When is the last time you made a profit, Sovereign Security?

⁶ This transcript was produced in the criminal case, bates numbers 1174-1228. The actual transcript page numbers are referenced herein. The transcript does not have a date, but it is after the 2014 break in was discovered on February 4, 2014 and before the hearing was continued to February 24, 2014. See page 53 of Transcript, Exhibit 6.

- 1 A. I didn't make one.
- 2 Q. You've never made a profit?
- 3 A. No. It was coming up. It just fell apart at the last time.
- 4 Q. Have haven't made a profit in 11 years?
- 5 A. I didn't make anything because I was building up a new type of business and
- 6 nobody believed it could exist.
- 7 Q. When is the last time any money from Sovereign Security accounts either in cash
- 8 or in an account was paid over to your personally?
- 9 A. Never received anything.
- 10 Q. Never received a dime?
- 11 A. Not from there. No.
- 12 Q. You didn't take any salary or any benefits at all from the company?
- 13 A. No, I did not.
- 14 Q. Why did you do it for 11 years if you weren't getting a penny out of it?
- 15 A. You got – when you're an entrepreneur, you have a crazy idea, and it stays with
- 16 you, and it pushes you.

17 Id., pages 43, 44. Shaikin also listed himself as a creditor in his bankruptcy schedules claiming

18 he had advanced \$2.3 million to the business which was owed to him because it was business

19 loans. Id., page 32.

20 Shaikin had motive to rob and burglarize the business. He also had the means. As he

21 said in the 2012 conversation with Mr. McDaniel, "I came up with which boxes to go to, 30

22 boxes of ugly nasty customers without proof, without recourse of any type." Exhibit 4.

23 c. Civil Forfeiture Proceedings

24 The government submitted a complaint for in rem civil forfeiture, under seal, to the

25 court in 2016. Within that complaint, it reiterated, verbatim, a crime stoppers tip received in

26 January 2015, three months after Elliot Shaikin died, implicating Mr. McDaniel and Ms.

27 Whitmore in the instant offense. See Exhibit 27. Of course, the crime stopper tip says nothing

28

1 about Mr. Hurbace. Shaikin's confession predicted exactly this "anonymous" tip. See Exhibit
 2 1.

3 d. Bankruptcy Trustee Trial Testimony

4 At trial, Bankruptcy Trustee Shapiro testified that Shaikin was quite upset when he took
 5 over the business. ECF 216, Trial Transcript, Day 2, page 61. He testified that after being
 6 appointed trustee, he became aware that Elliott Shaikin was still operating the business, including
 7 taking on new customers. Id. at 61. Shapiro had to visit the site and shut the business down,
 8 forcing Shaikin out. Id. Shaikin was "not happy" about being forced out. Id. at 71. Shaikin did not
 9 appear to know that he was going to lose control of the business and therefore, access to the vaults
 10 and their contents. See Declaration of Lisa Rasmussen. When asked by Mr. Shapiro what he took
 11 out of the business the day he left, or what was inside the bags he carried out, he said "personal
 12 things and lunch from his wife." Exhibit 5, page 47. He was not expected to be removed from
 13 the business. The day he was removed was approximately January 31, 2014. See Declaration of
 14 Lisa Rasmussen. Mr. Shapiro discovered the burglary on February 4, 2014. ECF 216, Trial
 15 testimony, Day 2, at page 66.

16 The person with motive to carry out the Burglary in 2014 was Shaikin. He was angry and
 17 felt that he was owed \$2.3 million. As he said in the confession, "Fuck 24/7 and Shapiro."
 18 Exhibit 1. As the anonymous author wrote, "Elliot was a good man who tried hard. For him there
 19 was no failure. He would not accept it." Id. Even the government has conceded that it is possible
 20 the owner was involved. See Motion in Limine hearing transcript, January 9, 2020, page 21.
 21 Shaikin admits he and Hurbace were responsible for the 2014 break in to "get the money" out of
 22 the "bankrupt business." Exhibit 1. These civil pleadings just further corroborate his motive and
 23 his ability to do it. Like he said, he set up the security, the alarm and cameras could be disarmed
 24 from remote.

25 e. The Confession is Reliable and Admissible

26 The Toda Raba letter and Shaikin's statement are admissible and present no hearsay
 27 obstacles. Shaikin's dying declaration present a well-settled hearsay exception. Mattox v.
 28

1 United States, 156 U.S. 237, 243-44 (1895). His statement was unequivocally made “without
2 hope or recovery and in the shadow of impending death.” Shepard v. United States, 290 U.S.
3 96, 99-100 (1933) (citations omitted).

4 Moreover, both the Toda Raba letter and Shaikin’s dying declaration bear strong indicia
5 of reliability. Both statements facially indicate that they were made voluntarily, and bear no
6 indication of coercion or undue influence. See Exhibit 1; see also United States v. Layton, 855
7 F.2d 1388, 1405 (9th Cir. 1988) (citing Barker v. Morris, 761 F.2d 1396, 1401 (9th Cir. 1985),
8 cert. denied, 474 U.S. 1063, (1986) and Steele v. Taylor, 684 F.2d 1193, 1204 (6th Cir. 1982),
9 cert. denied, 460 U.S. 1053 (1983)).

10 Both the letter and Shaikin’s dying declaration are corroborated. Id. (citing Barker at
11 1402, United States v. Nick, 604 F.2d 1199, 1204 (9th Cir. 1979) (per curiam), and United
12 States v. West, 574 F.2d 1131, 1135 (4th Cir. 1978)). The author of the anonymous letter
13 included evidence to prove he/she actually knew Shaikin, including a photograph of Elliot
14 Shaikin and his wife Ella Burns. See Exhibit 1 at page 3; see also n.3 herein and accompanying
15 Las Vegas Review Journal article with comments to clearly relating to the photograph. The
16 contents of the letter make it clear the author was aware of the outcome of the trial, and was
17 offering Shaikin’s declaration to address it.

18 Shaikin’s dying declaration is also highly corroborated. In it, he state’s “Phil [Hurbace]
19 wants to call crime tip line & blame employees. They were not involved. Police are stupid!
20 Elliot.” This falls directly in line with the January 26, 2015 report to Crime Stoppers referenced
21 in Exhibit 20. It is clear that Hurbace followed through on this idea and did exactly what he told
22 Shaikin he said he would do, and called Crime Stoppers to falsely implicate McDaniel and
23 Whitmore. Id. Shaikin’s declaration is further supported by the Crime Stoppers report attached
24 as Exhibit 21. In this report, the anonymous tipster directly names Phil Hurbace as the
25 perpetrator of the 2012 robbery at issue herein and includes emails between the tipster and
26 Hurbace in which Hurbace encouraged the tipster to participate in the robbery, along with
27 includes security camera images a layout of the 24/7 Private Vaults which Hurbace attached to
28 the email. Id.

1 Shaikin's dying declaration was made spontaneously to the anonymous author "in the
2 final days before his death." See Exhibit 1; see also Layton, 855 F.2d at 1405 (citing Dutton v.
3 Evans, 400 U.S. 74, 88-89, (1970) (plurality)).

4 5 **VI. The Evidence Presented at Trial**

6 a. False Evidence by McCamey / Napue

7 Few things are more disappointing than a law enforcement agent giving false testimony
8 in a trial. Unfortunately, that happened here. FBI SA Gary McCamey testified that he
9 investigated the 2012 robbery. See ECF 217, Trial Day 3 at 20. He testified about an interview he
10 had with Ms. Whitmore on June 2, 2012. McCamey said during the interview, Whitmore denied
11 any involvement in the robbery, but claimed she admitted to drilling safes and taking money in
12 the past in 2008 or 2009. McCamey testified that Whitmore explained she returned the money
13 after someone complained about it. Id. at 20-21. McCamey also claimed Whitmore participated in
14 another set of thefts in 2010. Id. McCamey conceded he was not aware of any adverse action
15 taken by 24/7 against Ms. Whitmore in relation to these events. Id. at 31.

16 McCamey did not investigate the robbery in 2012, LVMPD did with Detective Doesch
17 being the primary detective assigned to the case. The FBI's investigation did not open until
18 January 2015. McCamey was asked to conduct a polygraph of Mr. McDaniel and Ms. Whitmore
19 and he was only asked to conduct polygraphs. In his report, which is attached hereto as Exhibit 6,
20 he wrote:

21 During the pre-test interview, Cordova provided the following
22 information:

23 Within the first year of working at 24/7 Private Vaults,
24 Cordova met a locksmith named "Phil", who did occasional work
25 at the vaults. Phil told Cordova that he was able to drill
26 into the vaults inside 24/7. Phil convinced Cordova that they
27 could steal money from the vaults without being caught. On
28 four different occasions when Cordova was working alone on the
night shift, she let Phil into the vault area to drill vaults.
Cordova advised that Phil drilled the vaults around
Thanksgiving, Christmas and New Years in approximately 2008-
2009.

Cordova and Phil split the money that they obtained from the
vaults. Cordova advised that her half of the money amounted

1 to approximately \$250,000. Cordova believes that Phil may
2 have taken more than that amount for himself.

3 Cordova and Phil were stealing money from vaults that
4 were in good standing, not vaults that had been abandoned.
5 Shortly after the fourth theft, a Mormon man complained to the
6 owner that he was missing approximately \$250,000 from his
7 vault. Cordova decided to tell the owner about the money that
8 she and Phil had stolen. Cordova had only spent \$5,000 of the
9 money. Cordova returned \$245,000 to 24/7 Vaults and then took
10 \$5,000 from her savings account to reimburse the remainder of
11 the money. The owner of 24/7 called Phil into the office and
12 confronted him about the thefts. Phil initially denied any
13 involvement in the thefts. Phil eventually admitted his
14 involvement and returned \$20,000 of the stolen money. Phil
15 said that he had given the rest of the money to charity.

16 Neither Cordova nor Phil were reported to the police for
17 their involvement in the thefts.

18 . . .

19 Cordova denied any knowledge, planning, or participation
20 in the robbery at 24/7 Vaults that occurred on April 14, 2012.

21 The following relevant questions were asked during the
22 examination for Robbery Series I:

- 23 A. Did you participate with anyone in robbing the 24/7 vaults on
24 April 14, 2012? (Answer: No)
25 B. Did you plan with anyone to rob the 24/7 vaults on April 14,
26 2012? (Answer: No)

27 The results of this examination are located in the
28 "Examination Results" Section at the top of this report.

18 Id. The results are that she was not deceptive in response to the questions posed to her. Id. In
19 other words, she passed her polygraph examination. But more importantly, Ms. Whitmore did
20 not say any of these things to SA McCamey. See Declaration of Sylviane Whitmore. She
21 actually provided information to LVMPD Detective Doesch, and even those statements were not
22 the same statements provided here, but a portion of what she told Detective Doesch is conveyed
23 here by McCamey, although it is substantially inaccurate and completely out of context. Id.
24 First, Ms. Whitmore did not start working at 24/7 until 2009, so there is nothing she would have
25 done at all in 2008. Id.

26 Second, what Ms. Whitmore told Detective Doesch, approximately two or three days after
27 the 2012 robbery when he was in the 24/7 office talking to all employees, was that on December
28

1 31, 2009, Hurbace came in to drill vaults. Id. She was working that night. Id. She became
2 suspicious as to what he was doing and in response, he (Hurbace) came out and plopped a bag on
3 the desk and told her “there is more where this came from” which she perceived as an attempt to
4 stop her from questioning his activities or to “buy her silence.” Id. She did not know what to say
5 and was actually quite perplexed by it. Id. She took the bag home because she felt it not safe to
6 leave it there and she brought it back to work the next day, January 1, 2010, at 7:30 a.m., over two
7 hours prior to her regularly scheduled 10:00 a.m. shift. Id. She gave the bag to Elliot Shaikin and
8 reported what had happened the night before. Id. They counted it, in the presence of bookkeeper
9 Morris Golden and there was \$245,000 in the bag. Id. Shaikin fired Hurbace and was very, very
10 angry at Hurbace over the incident, or at least Ms. Whitmore believed he was angry. Id. Ms.
11 Whitmore believed she had done the right thing. Shaikin kept the funds she returned. Id.

12 In approximately April 2010, a man came in to get money out of his box and he
13 complained to Shaikin that he was missing \$250,000 from his box. Id. Shaikin assumed that the
14 money Ms. Whitmore had given him on January 1, 2010 was his, and he gave it to him. Id. No
15 one knew his name, but he was a Mormon man from southern Utah. He complained when he
16 received \$245,000 and argued with Shaikin that he had \$250,000. Id. Shaikin refused to give him
17 \$5,000. Id. Ms. Whitmore felt bad that she had even taken the money home and brought it back
18 or that she had touched it and she withdrew \$5,000 from her savings account and brought the
19 money to 24/7 to cover it so that the man would not accuse her of stealing. Id.

20 Additionally, there were three occasions that Hurbace accessed the vaults while Ms.
21 Whitmore was working, not four. The three were (not four as stated by McCamey): Thanksgiving,
22 Christmas and New Year’s, all in 2009. Id. See Exhibit 7, door access data showing the three
23 (not four) occasions, November 26, December 18 and December 31, 2009.

24 This is what happened, and this is what Ms. Whitmore told Detective Doesch. Whitmore
25 Declaration. She told Detective Doesch this because she thought it was important for him to
26 know that Hurbace was drilling vaults and that he handed her \$245,000 and said, “there is more
27 where this came from.” Declaration of Sylviane Whitmore. She did not tell anyone that she took
28

1 \$5,000 of the money, instead, she explained that she paid \$5,000 of her money because she felt
2 bad for the man and Shaikin refused to pay him \$5,000, but he did fire Hurbace. Id. None of this
3 was relayed to McCamey, it was all information Ms. Whitmore provided to LVMPD Detective
4 Doesch. Id. For whatever reason, SA McCamey wrote these statements in his report as if she had
5 made the statements to him, when in fact, she had not. Id. Worse, he also testified that she made
6 the statements to him, when in fact she not only didn't make the statements attributed to her, she
7 didn't make any of the statements inserted above to McCamey. Id. Her conversation with
8 McCamey was about the polygraph and was very limited to that. She did sign a Miranda waiver
9 when she was doing the polygraph. That part is accurate. Id. She did answer the polygraph
10 questions. Id.

11 Ms. Whitmore did tell Detective Doesch about the times she could recall Hurbace being in
12 the vault when she was there, and she identified approximately three times total. Id. That part is
13 correct, but she did not say that she had been receiving money from Hurbace each of those three
14 times as McCamey states and her conversation was with Doesch, not McCamey. Id. It is
15 unknown why McCamey wrote this in his report and/or what narrative he obtained from Doesch.
16 This is the problem with not recording statements. The undersigned subpoenaed LVMPD for its
17 entire files for the 2012 and 2014 events because the information provided by the government is
18 incomplete. See Declaration of Lisa Rasmussen, and Subpoena to LVMPD, attached hereto as
19 Exhibit 8. In the subpoena, the undersigned requested all notes taken by Doesch related to the
20 2012 investigation. Id. There were no notes from Doesch provided by LVMPD. Id. In fact, there
21 are no references in the entire investigative report about any interviews, recorded or not, with any
22 employee at 24/7, even though Doesch interviewed every single employee and took notes in his
23 notebook when he interviewed Ms. Whitmore and Mr. McDaniel. Id. He did say in his "folder
24 note" dated May 23, 2012 that all employees are considered suspects, but none of them gave him
25 the impression they were involved. See Exhibit 9.

26
27 Somehow, Ms. Whitmore's unrecorded statement to Detective Doesch, telling him her
28 prior experience with Hurbace, was transmuted into the notion that she had been drilling boxes,

1 when in fact she has never drilled a box, and it also morphed into something she had admitted
2 doing in 2008 (when she did not work there) and then again in 2009 and 2010 when she “got
3 caught” by the Mormon man. In reality, none of this is what she said, and it is not what
4 happened. See Declaration of Sylviane Whitmore. Ms. Whitmore did not give the \$245,000 to
5 Shaikin in April, she gave it to him on January 1, 2010, the very next morning after Hurbace
6 handed it to her. Id. See photo of money, Exhibit 10, Bookkeeper Morris Golden’s statement
7 about receiving the \$245,000 on January 1, 2010, Exhibit 11, and Sylviane Whitmore’s
8 corresponding Statement dated January 1, 2010, Exhibit 12. Exhibits 10 and 11 were located
9 on the disc attorney Todd Leventhal recovered from 24/7 vaults and were provided to Mr. Hill
10 in January 2022. See Declaration of Dan Hill. The metadata on each of these photographs
11 indicates that the were taken on January 1, 2010. The originals are available for inspection. Id.
12 A photograph of the \$5,000 withdrawal Ms. Whitmore made from her money market savings
13 account is attached hereto as Exhibit 13. This shows that she made the withdrawal on April 13,
14 2010. This check was located in the discovery provided by the government as indicated in the
15 handwritten notations. Id. Finally, a statement signed by the Mormon man, stating that he
16 received \$250,000 cash on April 13, 2010 and that this is the entirety of the money or assets he
17 had in his vault box is attached hereto as Exhibit 14. Exhibits 12 and 14 were provided to Ms.
18 Whitmore upon her request by Morris Golden in April 2010. See Declaration of Sylviane
19 Whitmore. The metadata on the originals indicates that the images were created in April 2010
20 and the digital images are available for inspection.

21 Morris Golden, the former bookkeeper who authored the January 1, 2010 statement is
22 deceased, but there are numerous comparative signatures for him in the discovery provided by
23 the government in this case. See Exhibit 15.

24 In sum, Ms. Whitmore did not tell SA McCamey that she stole money with Hurbace in
25 2008-2009 and that she returned it when she was confronted in April. Not only did she not tell
26 McCamey that, she did not tell Detective Doesch that either. Why? Because it wasn’t true.
27 What is true is that Hurbace handed her the money on December 31, 2009 when she began
28

1 questioning what he was doing. See Exhibit 12. She returned the money to Shaikin the very
2 next day. See Exhibits 10, 11 and 12. When the man said he had \$250,000, not \$245,000,
3 Shaikin refused to give him \$5,000, she did because she felt responsible for taking the money
4 out of the business until the following morning. See Declaration of Sylviane Whitmore and
5 Exhibits 13 and 14.

6 The government has an obligation to correct testimony it knows is wrong or inaccurate
7 or misleading. Napue v. Illinois, 360 U.S. 264 (1959). While these movants are not in a
8 position to argue that the government knew SA McCamey's testimony was false, the
9 government is on notice at this point. The evidence submitted herein demonstrates that SA
10 McCamey's testimony and report are grossly inaccurate and horribly misleading. This grossly
11 misleading, if not false testimony became a narrative not only during trial, but prior to trial with
12 this Court. Based on the short interactions the undersigned has had with the Court, there seems
13 to be an unfounded government advanced false narrative that Ms. Whitmore was "involved in
14 stealing money with Hurbace" in other incidents in 2008 and 2009. She did not even work there
15 in 2008. These things were casually referenced as "other bad acts" but there is nothing to
16 support them other than McCamey's statement, a statement Ms. Whitmore never made to him.
17 Or to anyone, for that matter. It should also be noted that Detective Doesch, the lead
18 investigator in the 2012 robbery, was not called as a witness by the government. Had he been
19 called; he certainly would have been cross examined on the fact that he interviewed all
20 employees of 24/7 and that there is nothing in LVMPD's police report about any of those
21 interviews. It is not known why the government did not call him as a witness and certainly
22 defense counsel should have. It is also not known why there is no reference in LVMPD's
23 records to his employee interviews.

24 Ms. Whitmore volunteered the information about the December 31, 2009 incident to
25 Detective Doesch when she came to the store for her regularly scheduled day shift
26 approximately two days after the robbery. See Declaration of Sylviane Whitmore. She knew
27 the business had been robbed and she believed that it would be important for Detective Doesch
28

1 to know about the prior incident with Hurbace. *Id.* She assumed that Shaikin would have told
2 Doesch about Hurbace and she even asked Shaikin if she should tell the detective about
3 Hurbace. *Id.* Shaikin's response to her was "If you want to." *Id.* This was an odd response
4 from Shaikin as one would have assumed that would have been the first thing that he would
5 have told law enforcement – about the former locksmith and "security manager" who took at
6 least \$250,000 from a vault and gave it to another employee. Conversely, the last thing one
7 would do if they were involved in a robbery at their place of business would be to tell a
8 detective about the time a fellow employee handed her \$245,000 after cruising the vault for the
9 evening.

10 b. Trial testimony generally

11 Jo Anne Wiley from the taxation department of Nevada's DETR testified that according to
12 state tax filings, Mr. McDaniel and Ms. Whitmore each made about \$2000 a month as employees
13 of 24/7 Private Vaults. *See* Trial Day 1 at 43. Ms. Wiley testified that based on other records,
14 McDaniel and Whitmore made similar or smaller wages in the years proceeding their employment
15 at 24/7. *Id.* at 44-49. Ms. Wiley conceded that the records don't report any sort of inheritance or
16 non-wage income. *Id.* at 57.

17 LVMPD CSA Jeffrey Scott provided foundational testimony for the introduction of the
18 photographs of the 2012 robbery scene. *Id.* at 59-90.

19 LVMPD Detective Justin Beveridge testified regarding the 2012 robbery. He testified that
20 his role at the scene was to document the property taken and identify whose property was taken to
21 the best of his abilities given the anonymity of the 24/7 vaults. *See* Trial Day 2 at 12. He was able
22 to identify the owners of approximately 10 of the compromised vaults by way of personal
23 identifying papers left in the vaults. *Id.*

24 Bradley Burns was a customer of 24/7 beginning in the summer of 2010. *Id.* at 26. Burns
25 explained, generally, the security measures of accessing the vaults as a customer. *Id.* at 30. Burns
26 testified about a lifetime's worth of jewelry he and his wife stored at 24/7. *Id.* at 32. Burns
27 detailed a unique Roger Dubuis watch that was stored there. *Id.* at 34. He explained that
28

1 sometime in 2012 he accessed his vault and discovered it was empty. *Id.* at 35. He testified that he
2 later secured the watch's return through a detective on the case. *Id.* at 36.

3 Debra Beever, a banker at Plumas Bank, testified about a cash deposit she supervised in
4 the amount of \$141,636.95 by Phillip Hurbace on June 27, 2012. *Id.* at 51. Hurbace made the
5 deposit into a title company's account. *Id.* at 53.

6 Brian Shapiro was the bankruptcy trustee of 24/7 when it filed for Chapter 7 bankruptcy in
7 January of 2014. *Id.* at 59. He testified that after being appointed trustee, he became aware that
8 Elliott Shaikin was still operating the business, including taking on new customers. *Id.* at 61.
9 Shapiro had to visit the site and shut the business down, forcing Shaikin out. *Id.* Shaikin was "not
10 happy" about being forced out. *Id.* at 71. A short time later, Shapiro determined the contents of the
11 vaults was not property of the bankruptcy estate and issued press releases advising people to
12 retrieve their property. *Id.* at 66. Shapiro discovered on February 4, 2014 that 24/7 had been
13 burglarized through a hole in the wall. *Id.* at 66. Shapiro had not inventoried the vaults to know
14 what, if anything, was taken during the burglary. *Id.* at 76.

15 LVMPD CSA Caitlin King provided foundational testimony for the introduction of the
16 photographs of the 2014 burglary scene. *Id.* at 92-139.

17 Sally Solis Hernandez was a banker in 2014 who managed a \$190,000 cash deposit by
18 Ms. Whitmore on August 4, 2014. *Id.* at 142. Ms. Whitmore deposited the cash into an account in
19 her name. *Id.* at 144. Solis Hernandez testified that Ms. Whitmore willingly provided identifying
20 information and photo ID in the process of making the deposit. *Id.* at 145.

21 Michael Branham is a Chase Bank teller who assisted Mr. McDaniel and his mother
22 Verna open checking and savings accounts on February 5, 2014. *Id.* at 148. Verna deposited
23 \$392,000 cash into the accounts. *Id.* at 149. Branham testified that McDaniel explained that the
24 cash was found in various hiding spots throughout Verna's house after McDaniel's father died. *Id.*
25 Branham explained it was uncommon for cash to have been reported as previously kept in
26 mattresses, pillows, and other hiding spots throughout a house. *Id.* at 150. Verna later added
27 McDaniel as a signer on the accounts. *Id.* at 153.
28

1 Christopher Beckner is a branch manager with Chase Bank. *Id.* at 169. He testified that on
2 May 18, 2015, McDaniel opened an account in McDaniel's name at his branch with a cash
3 deposit of \$141,900. *Id.* at 172. McDaniel explained to Beckner the money was recovered from
4 his mother's house after his mother died. *Id.* McDaniel willingly provided all necessary
5 identifying documents in opening the account. *Id.* at 176.

6 Kerin Schroeder worked the night shift at 24/7 during the 2012 robbery. *Id.* at 184. On the
7 morning of April 14, 2012, she returned from the restroom to find three men with ski masks. *Id.* at
8 186. After a skirmish, the men taped her to a chair in the restroom. *Id.* at 187. On her way to being
9 bound in the restroom, she saw the robbers fussing with the alarm. *Id.* at 189. She heard the
10 robbers communicating on radios while she was bound. *Id.* at 190. After a time when the hallway
11 was quiet, she wheeled herself in the chair over to the phone and called the police. *Id.* at 192. It
12 was clear the store had been ransacked. *Id.*

13 Francis Spotten was a night-time security guard at 24/7. *Id.* at 32. She explained the
14 photographs taken at each incident to the jury for context of the store. *Id.* at 32-50. She testified
15 that Hurbace worked on 24/7's security system and maintained a workshop there, where he
16 would, in part, drill out abandoned or unpaid safes. *Id.* at 50.

17 Jane Spotten, Francis' wife, was also a night-time security guard for a time at 24/7. *Id.* at
18 65. She testified to a time she saw Hurbace access the VIP vault through the ceiling when there
19 was a lock malfunction, and everyone was locked out. *Id.* at 67.

20 LVMPD Det. Gary Chaney testified about a \$269,000 cash deposit made by Ms.
21 Whitmore into a NSB account on November 21, 2012. *Id.* at 81. He explained that Whitmore
22 wrote a \$230,000 check out of that account on October 7, 2013 and deposited it into her mother's
23 account at Chase, where Whitmore was a signer. *Id.* at 86. Chaney testified that although
24 Whitmore's mother died in 2014, in 2015 Whitmore made two approximately \$100,000
25 transactions out of her mother's account (on which Whitmore was a signer). *Id.* at 90. One
26 transaction was to a title company, and the other was a cashier's check from when the account
27 closed made out to Whitmore's mother, which Whitmore used to open another bank account. *Id.*
28

1 at 93-94. Chaney explained that Whitmore used some of the money from the account Solis
2 Hernandez opened with a \$190,000 cash deposit to buy a car. *Id.* at 100.

3 Chaney testified that McDaniel transferred around \$90,000 out of the joint account he
4 opened with his mother to an account he held alone in April of 2009. *Id.* at 112. The remainder of
5 the money in the joint account was used to open other bank accounts in McDaniel's name alone.
6 Those funds were used to purchase a house and a Porsche. *Id.* at 120-125.

7 Chaney also testified about a property Hurbace purchased with cash deposits. *Id.* at 128.
8 He testified that on June 15, 2015, Hurbace tried to pawn the Roger Dubuis watch, which was
9 discovered by its serial number at attempted sale. *Id.* at 131.

10 McDaniel called his realtor from prior to the 2014 burglary. She testified that prior to
11 2014, he wanted to purchase a property for cash. *See* Trial Day 5 at 25-26. She told him he needed
12 to deposit the cash to show proof of funds. *Id.*

13 Whitmore called a few witnesses. Her niece Taylor testified to Whitmore's mother's
14 lucrative cigarette business. *Id.* at 29. She testified that Whitmore took over the business and ran it
15 for many years. *Id.* Taylor accompanied Whitmore to the casinos during business operations
16 countless times. *Id.* at 31. She regularly saw large amounts of cash earnings that were kept in the
17 cigarette room's safe. *Id.* She testified that Whitmore's relationship with her brother was strained.
18 *Id.* at 34.

19 Laura Engel, Whitmore's mother's best friend, testified by way of deposition. She had
20 known Whitmore's mother since childhood. *See Laura Engel Deposition* at 5. She was familiar
21 with the mother's cigarette vendor business and was aware that it was a cash business. *Id.* at 8.
22 She testified that at the height of the mother's cigarette business, it was customary in Las Vegas to
23 keep earnings in cash. *Id.* at 16. Whitmore's cousin Linda also testified by deposition. Linda
24 corroborated that Whitmore's mother's cigarette business was a lucrative cash business. *See Linda*
25 *Brown Deposition* at 7. She regularly saw Whitmore's mother with large amounts of cash. *Id.* at 9.

26 Whitmore's ex-husband, Arturo, testified that Whitmore got almost \$100,000 cash out of
27 the house they sold. *Id.* at 43-44. He also gave Whitmore cash when they divorced. *Id.* at 54.
28

1 Whitmore's accountant testified about a December 2012 meeting regarding an inheritance from
2 Whitmore's parents. He was aware of a \$190,000 proposed inheritance from her mother and another
3 \$269,000 from her father. *Id.* at 59. Linda Dobash was a friend of Whitmore's mother. *Id.* at 70.
4 She testified to having seen Whitmore's mother's safe full of high-denomination cash and jewelry
5 between 2008 and 2010. *Id.* at 79.

6 The government called Whitmore's estranged brother Mark as a rebuttal witness. Mark
7 testified that he was the executor of his father's estate. *Id.* at 101. He was not aware of any cash. *Id.*
8 He recalled distributing the estate's assets in checks. *Id.* at 102. He conceded that his relationship
9 with Whitmore is and has been strained. *Id.* at 104. He also agreed that Whitmore's cigarette
10 business was lucrative. *Id.* Although he was the executor to his father's estate, he was less familiar
11 with his mother's estate. *Id.* at 108. He testified it was possible his mother may have had significant
12 amounts of undisclosed cash. *Id.*

13 **VI. The Evidence NOT Presented at Trial**

14 a. Evidence the Government Failed to Present at Trial

15 The government did not present any direct evidence of Whitmore or McDaniel's
16 involvement in either the robbery or the burglary. Neither did the government present a coherent
17 and full picture that circumstantially preponderates in favor of the convictions. The
18 investigation was, at best, piecemeal. The government presented no evidence of either
19 Whitmore or McDaniel having any contact with Hurbace after he was fired in 2010. More
20 importantly, the government provided no direct evidence that any of the cash in question was
21 ill-gotten. No investigator was able to determine how much cash—if any—was taken in either
22 incident. No missing property—cash or otherwise—was inventoried save for limited personal
23 property from the 2012 robbery that was recovered when Hurbace tried to sell it.

24 Instead, the government started with large cash deposits, assumed guilt, and worked
25 backwards. Nothing traces the cash deposits in this case back to any illegal proceeds. Instead,
26 the government assumed and argued illegality unless proven otherwise.

27 ...
28

b. Evidence Prior Counsel for Whitmore and McDaniel Did Not Present at Trial.

Mr. McDaniel has been in possession or has recently discovered documentation and photographs that irrefutably establish the legitimate source of his cash deposits at issue in this trial. Two testamentary documents from his father explain that his father's cash and gold were transferred to McDaniel's mother after his death, and to McDaniel after his mother's death. Exhibit 21. A 1981 receipt and subsequent newspaper article document McDaniel's mother's sale of her husband's violin for \$390,000 cash in 1981. Exhibit 18, 19. A pair of photographs show McDaniel's mother holding a pillow, the inside of which contains \$100,000 cash. Exhibit 20. A pair of 1989 photographs show a box in Ms. McDaniel's home, the inside of which is photographed to contain \$765,000 in cash. *Id.* All the metadata for the digital photos or scans depict creation or scan dates years before either the 2012 or 2014 events. *See Decl. of Larry McDaniel.*

McDaniel preserved a contract for a personal box at 24/7 he rented from January 2006 through January 2012. Exhibit 18. It has his mother's name and McDaniel's initials on it. *Id.* McDaniel and his mother stored the \$765,000 cash and 60 gold coins in that box. *See Declaration of Larry McDaniel*. Uneasy with leaving such a large amount in a private vault, McDaniel's mother obtained, through McDaniel, a written acknowledgement from Shaikin of the \$765,000 and gold coins being stored at 24/7. *Id.* The acknowledgment was signed by Shaikin, McDaniel, and McDaniel's mother. Those scanned documents' metadata likewise reflects a scan date more than three years before the 2012 robbery and six years before the 2014 burglary. *See Declaration of Larry McDaniel.*

Shortly after Mr. McDaniel closed his box at 24/7 and returned the cash and gold home, he and his mother used some of the money to purchase a property. McDaniel's U.S. Bank statement from January of 2012 (three months before the robbery and three years before the burglary) shows a \$189,000 cash deposit. Exhibit 22.

Hurbace was given unfettered access to enter the vault any time he wanted and for any

1 purpose he wanted prior to January 1, 2010. See Exhibit 16. Defense counsel did not present
2 this Exhibit, which was on the 24/7 disc that Mr. Leventhal obtained by visiting the store. It
3 was located in a box he provided to Mr. Hill in January 2022. Similarly, Exhibit 7 shows the
4 three times that Hurbace was present when Ms. Whitmore was working and shows that each
5 time, Ms. Whitmore used her iris to access the vault for him, something no one would do if they
6 were conspiring and did not want to leave a record of granting him access. See Exhibit 7.

7 Exhibit 28 shows that Hurbace (P.K. Electronics) set up the security and alarm system
8 and zones. It also shows that the “master code” is “known only by Elliot” and that the TSI
9 Passcode is Wolf. The passcode is for employees to give to TSI should they call and wonder if
10 there is a break-in. The master code is how the system is disarmed and armed from remote and
11 only Elliot had that code. Id. Also note that the code 65412, which appears “posted on the
12 wall,” is a duress code, not a code to disarm the system, as represented by the government. Id.
13 This Exhibit was also on the 24/7 disc.

14 Exhibit 17 is a flyer that advertises for a “licensing opportunity” for investors and
15 attached to that is a handwritten note by Shaikin that says “Sylviane to inherit 6 figures from
16 father per mother- cash invest 24/7? Very hard to find ES.” Id. There are also some
17 typewritten notes about other possible investors.

18 Exhibit 27 shows an anonymous tip to Crime Stoppers implicating Hurbace in the 2012
19 robbery and showing detailed notes about his (Hurbace’s) plan for the event. Perhaps this was
20 excluded as part of a motion in limine prior to trial, but the information is quite clear that
21 Hurbace planned this event with three others who are clearly not Ms. Whitmore or Mr.
22 McDaniel. This is from discovery produced by the government. Notably, there is a “woman”
23 listed and the government suggested at trial that when Schroeder could hear a woman’s voice,
24 which had to have been the voice of Ms. Whitmore.

25 A vehicle registered to Hurbace’s then girlfriend, Gloria Rodney, was at the 24/7
26 location the morning of the April 14, 2012 robbery. See Exhibit 30. Neither party brought
27 these photos into evidence, though the documents were in discovery in the criminal case. Id.
28

1 This further corroborates Shaikin's confession.

2 Ms. Whitmore loaned \$50,000 to Shaikin in April 2010. See Exhibit 29. He paid her
3 back. No one introduced evidence of how well she treated Shaikin and how kind she was to
4 him.

5 Tax returns from Suzette Whitmore's cigarette concession business were never
6 introduced, though they plainly showed that Suzette's business often grossed close to half a
7 million dollars per year in declared revenue. See Exhibit 31.

8 Additionally, the TSI security log for the alarm system at 24/7 around the time of the 2012
9 robbery was obtained from exhibits of Shaikin's civil trial. See Declaration of Daniel Hill. The
10 manual for the exact system was open-sourced. *Id.* The two together indicate the testimony
11 regarding the robbers' activity at the alarm keypad was mistaken or inaccurate. The registered
12 actions in the log indicate the robbers triggered a "bypass event." See Exhibit 32. According to the
13 manual, the system can only be "bypassed" if it was already disarmed. See Exhibit 33. Disarming
14 the alarm would show as "opening," not "bypassed." *Id.* This means that the alarm system was
15 already disarmed before the robbers arrived—and the log indicates it had been disarmed for some
16 time.

17 While none of these items are newly discoverable, the court must take them into
18 consideration under the totality of the circumstances when deciding whether to grant a motion
19 for new trial. These documents are presented because the primary issue before the court is that a
20 third party has confessed to the crimes that these two defendants are charged with and he has
21 not only confessed, he has exculpated Ms. Whitmore and Mr. McDaniel by stating that he and
22 Hurbace committed these acts and that they [Whitmore and McDaniel] did not. One of the
23 prongs the court must analyze is whether or not the newly discovered evidence would likely
24 lead to a different result. The entire trial would be different with Shaikin's confession. While
25 prior counsel did not believe they could present a defense involving Shaikin's liability (access,
26 motive) previously, that analysis is substantially different today. The other non-newly
27 discovered evidence provided throughout is important for the court to understand that evidence
28

1 that explains the financial transactions of the defendants does exist even if it was not previously
2 presented and that there is substantial “other evidence” inculcating Shaikin which corroborates
3 his confession. All of this other non-newly discovered evidence is presented to the court for
4 that purpose. The confession of another for the crimes at issue here is such a substantial matter
5 that it alters the entire approach to a trial, and it cannot be said that it would not make any
6 difference in the outcome.

7
8 **VIII. The Inescapable Conclusion that Shaikin and Hurbace are Responsible for**
9 **Both the 2012 Robbery and the 2014 Burglary and NOT Whitmore or**
10 **McDaniel**

11 The government told the jury that the offenses required insider knowledge and that no
12 one had more insider knowledge than the three defendants on trial in this case. While pushing
13 its focus away from the one defendant who had a traceable watch in his hand and encouraging
14 the jury to believe that Hurbace could only have committed the offense with the assistance of
15 Ms. Whitmore, the government ignored everything else that it knew to be true: that Shaikin had
16 even more insider knowledge than Ms. Whitmore and Mr. McDaniel and that he had the motive
17 and the means (Hurbace) to commit both offenses.

18 The anonymous letter is Elliot Shaikin’s confession. The confession inculcates Shaikin
19 and Hurbace in both events, though Hurbace was not charged with the 2014 incident, lucky for
20 him. The confession exculpates both Ms. Whitmore and Mr. McDaniel and even aptly predicts
21 that Hurbace wanted to call a crime tip hotline and blame “the employees.” Evidently he did
22 that after Shaikin died. For all of his failing and pride, Shaikin tried to do the right thing at the
23 last minute. It appears he took the money he had taken out of vault and secreted away for
24 himself “in the L vaults” via a burglary in 2014 after he realized that he had lost control of the
25 day to day operation and hence, access to the money that used to fall his way when customers
26 abandoned their boxes or when he staged a robbery. This may account for the fact that no one
27 has reported anything missing from the 2014 burglary. Not a single stolen property report has
28

1 been made in the eight years that have passed and this is likely because the money Shaikin had
 2 secreted away was abandoned loot. It would be interesting to know where Shaikin took his loot.
 3 The undersigned does not have access to any of his trust documents. What we did find in the
 4 discovery, however (on the 24/7 vault discs) was a rental agreement from 2013 for U.S. Private
 5 Vaults in Beverly Hills. Shaikin knew the owner of that business and they had exchanged
 6 business ideas and business models. See Declaration of Lisa Rasmussen and Sylviane
 7 Whitmore. Ironically, all of the vaults at U.S. Private Vaults were seized by the government
 8 and any unclaimed property is now in the possession of the government, forever forfeited. See
 9 Exhibit 34, LA Times news articles. The government probably has any property that Shaikin
 10 looted in the 2014 burglary anyway. Id.

11 Shaikin's confession is reliable and corroborated in many, many ways. It is also
 12 authenticated by a forensic document examiner. There is no doubt the outcome of a trial with
 13 these two defendants in possession of the confession of another who claims that he, not they,
 14 committed the offense is a material matter. It simply cannot be said that it would not matter. It
 15 matters so much that it creates an entirely different defense and an entirely different approach.
 16 Although it is certainly the government's right to still proceed to trial in the face of all of this
 17 confirmation that these are in fact Shaikin's words and that it is his confession,, the government
 18 certainly has a right to pursue what it believes to be a crime, albeit at its own peril.

19 It is respectfully requested that this Court issue an order granting a new trial on all
 20 counts with regard to all counts of conviction for Ms. Whitmore and Mr. McDaniel. The newly
 21 discovered evidence is exculpatory, and it cannot be said that it would not result in an acquittal.

22 IX. Analysis Of McDaniel's Count 9

23 The evidence preponderates against upholding the jury's verdict on counts 9 and 10
 24 against McDaniel for two reasons. Foremost, there was insufficient evidence to establish that
 25 McDaniel knew the cash deposited for use in each wire transfer was stolen. The money was
 26 deposited with no unusual activity with his elderly mother. Documentation was presented
 27 willingly at each deposit. No evidence was presented tracing the cash to the 2014 burglary. No
 28

evidence was presented, in fact, that anything was taken during the 2014 burglary.

Furthermore, the counts, which required a finding that money was stolen, and McDaniel knew it, was—at least from the government’s argument—predicated on count 8. The government argued in no uncertain terms that the cash McDaniel was depositing was from count 8. The government argued that the reason McDaniel knew the money was stolen was because of count 8. The jury was presented with count 8 and made a finding on count 8. In other words, even if counts 9 and 10 aren’t legally predicated on count 8, the government’s presentation of evidence and argument predicated counts 9 and 10 on count 8. This Court has already found that the verdict on count 8 cannot be legally supported. Based upon the government’s evidence and argument, then, counts 9 and 10 fall of their own weight.

X. Analysis of Whitmore’s Remaining Counts

The government presented the following evidence of financial transactions against Ms. Whitmore to support its theory of the case:

- A deposit/CTR report made on 11/21/12 in the amount of \$269,000. Trial Tr. Day 3, page 81.
- A check written for \$230,000 on 10/8/13. Id., page 83.
- An outgoing wire to Ticor Title on 3/26/15 in the amount of \$90,637.87. Id., page 89.
- A withdrawal on 5/28/15 in the amount of \$133,962.54. Id. at 89.
- A deposit to open an account at Wells Fargo in the amount of \$133,962.54 on 6/1/15. Id. at 94-95.
- A counter credit deposit for \$190,000 on 8/4/14 (into a Trust account). Id. at 97.
- Suzette Whitmore’s death was on 6/15/14. Id. at 90.
- A withdrawal of \$49,016.94 on 4/11/15. Id. at 99.
- A purchase from Cadillac Las Vegas West in the amount of \$49,016.94. Id. at 100. No date specified but corresponds to the 4/11/15 withdrawal. Id.
- The 49,016,.94 and the 133,000 withdrawals include at least some stolen funds. Id. at 103.

In closing, the government argued that defendants were liable because they had insider knowledge that “no one else would know.” Trial Tr. Day 5, page 142. That Hurbace and Ms. Whitmore were charged I the 2012 robbery and that Ms. Whitmore and Mr. McDaniel were charged in the 2014 burglary. Id. at 143-144. It argued that both Hurbace and Whitmore knew

1 that the ads about fortification were not true, and they had insider information about the security
2 system and that they were easily overridden.

3 The government argued that Hurbace had motive because he was hurting financial
4 having lost his retirement and because he was fired in 2010 after a heated argument with the
5 owner, though they never said why he was in a heated argument with the owner. Id. at 145.
6 They ran through a litany of Hurbace's "insider knowledge" but then opined that the one thing
7 Hurbace lacked was "inside information on worker shifts and customer flows," suggesting that
8 he needed Whitmore for this. Id. age pages 145-146.

9 The government then argued that Whitmore had the knowledge that Hurbace needed,
10 that she knew Schroeder's shift and that she was someone he could trust. Id. at 147. Then the
11 government opined that they had a "relationship beyond just work" though there was no
12 evidence whatsoever to support this far-flung theory. Id.

13 The government then walked through the 2012 robbery stating "they" at each step,
14 referring to Hurbace and Ms. Whitmore. Id. at 148. They found Schroeder the only person
15 there. They knew how to place the alarm on bypass. They knew how to take out the security
16 systems. They know how to rip out a DVD. Id. All of this before the government concedes
17 that they don't need to actually be there to be liable because after all, that is what a conspiracy is
18 all about. Id. at 149.

19 The government went on to argue that "months" after the robbery, Ms. Whitmore
20 deposited over \$250,000 at Nevada State Bank and then she later moved it to her mother's
21 account to disburse upon her death. Id. at 150-151.

22 There are only two transactions between the 2012 event and the 2014 event alleged by
23 the government and they are as follows:

- 24 • A deposit/CTR report made on 11/21/12 in the amount of \$269,000. Trial Tr.
25 Day 3, page 81.
- 26 • A check written for \$230,000 on 10/8/13. Id., page 83.

27 With regard to the 2014 event, the government argued that Ms. Whitmore "found no
28 additional work" after leaving 24/7 in the "third quarter of 2012," and she decided she would

1 steal again, this time with Mr. McDaniel. Id. at 152. The government suggested that they used
 2 the information Ms. Whitmore learned from the 2012 robbery to commit the 2014 burglary. Id.
 3 at 153. According to the Trustee, there was at least \$10,000,000 there, though no one came
 4 forward to say they were missing anything, it was just logical to assume there were victims. Id.
 5 at 154.

6 The government then argued that within six months of the 2014 burglary, Ms. Whitmore
 7 deposited \$190,000 into her mother's account "to hide it," and that six months after that deposit
 8 she began withdrawing the money for various purposes. Id. All of this "other movement" the
 9 government describes, it attributes to the 2014 event, and these are the following transactions:

- 10 • An outgoing wire to Ticor Title on 3/26/15 in the amount of \$90,637.87. Id.,
 11 page 89.
- 12 • A withdrawal on 5/28/15 in the amount of \$133,962.54. Id. at 89.
- 13 • A deposit to open an account at Wells Fargo in the amount of \$133,962.54 on
 14 6/1/15. Id. at 94-95.
- 15 • A counter credit deposit for \$190,000 on 8/4/14 (into a Trust account). Id. at 97.
- 16 • Suzette Whitmore's death was on 6/15/14. Id. at 90.
- 17 • A withdrawal of \$49,016.94 on 4/11/15. Id. at 99.
- 18 • A purchase from Cadillac Las Vegas West in the amount of \$49,016.94. Id. at
 19 100. No date specified but corresponds to the 4/11/15 withdrawal. Id.
- 20 • The 49,016.94 and the 133,000 withdrawals include at least some stolen funds.
 21 Id. at 103.

22 This is the government's "follow the money" argument, not Ms. Whitmore's. The
 23 transactions listed above translate to the following Counts alleged against Ms. Whitmore:

24 Count 6 Money laundering of \$269,000 on 11/21/12.

25 Count 7 Money laundering of \$230,000 on 10/8/13.

26 These are the two transactions the government attributes to the 2012 event.

27 Count 12 Interstate transport of stolen property, Ticor Title Wire of \$90,638
 28 on 3/26/15.

Count 28 Money Laundering, deposit of \$190,000 on 8/14/14.

Count 29 Money Laundering, withdrawal of \$49,016.94 for vehicle
 purchase

on 4/11/15.

Count 30 Money Laundering \$90,638 the Ticor Title Wire transfer o
3/26/15.

Count 31 Money laundering, \$133,963 withdrawal on 5/28/15.

Count 32 Money laundering, \$133,963 deposit to open WF account on
6/1/15.

See verdicts, ECF 227. This is the government's theory of which monies are attributed to which event. Therefore, granting a motion for new trial, the 2014 event, necessitates a new trial on counts 12, 28, 29, 30, 31 and 32.

The jury instruction states that "For Counts Twenty-Eight to Thirty-Two, the specified unlawful activity can be **either** Interference with Commerce by Robbery (Hobbs Act Robbery) as described in Count Two **or** Fraudulent Transfer of Property as described in Count Eight. ECF 210 at page 30. (**Emphasis in bold.**) 'Or' is defined as a 'disjunctive often with either or whether as a correlative, used to introduce a word or phrase expressing an object or action, the acceptance of which excludes all the other objects or actions mentioned'. Standard Dictionary, 1733." In re Mutchler, 95 B.R. 748, 756 (Bankr. D. Mont. 1989) Thus, the reader is told to pick an event, but not both. Since we do not know which event the juror selected as he predicate for counts 12 through 32, the court cannot determine whether a new trial is warranted on each of those counts or not, because there was no special verdict or selection required within the verdict forms.

"[A] verdict [must] be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." Yates v. United States, 354 U.S. 298, 312, 77 S. Ct. 1064, 1 L. Ed. 2d 1356 (1957), *overruled on other grounds* by Burks v. United States, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978); *see also* Stromberg v. California, 283 U.S. 359, 368, 51 S. Ct. 532, 75 L. Ed. 1117 (1931) ("[I]f any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld."); Skilling v. United States, 561 U.S. 358, 414, 130 S. Ct. 2896, 177 L. Ed. 2d 619

(2010) (explaining in a parenthetical that Yates stands for the proposition that "constitutional error occurs when a jury is instructed on alternative theories of guilt and returns a general verdict that may rest on a legally invalid theory").

In this case, the jury's determination may have been based on an invalid theory (count 8, subject to a new trial) or count 2, not otherwise previously addressed by Ms. Whitmore's counsel. In the event that this Court does not agree that a new trial is warranted on all counts based on the newly discovered evidence, it is respectfully submitted that a new trial must be granted for Ms. Whitmore not only as to Count 8, but also as to Counts 12, 28, 29, 30, 31 and 32.

XI. Conclusion

For each of the reasons set forth herein, it is respectfully requested that the Court grant Ms. Whitmore and Mr. McDaniel a motion for new trial on all counts of conviction. Rarely is there a case where a confession from a third party exculpates defendants on all counts with which they are charged. This is such a case. The Toda Raba letter, combined with the audio tape of Shaikin's conversation with Mr. McDaniel prior to the 2012 robbery are both newly discovered evidence that so undermine the verdicts that a new trial must be granted. Shaikin's confession is written by him, it contains as much indicia of reliability as the court could hope to see absent knowing who he handed it to after he wrote it. While the undersigned will certainly continue to search for the author, it is not necessary to know who sent the letter to the court because the letter is corroborated not just by its content and all other circumstances possibly known to the court, but it is also corroborated by the recorded phone conversation where Shaikin, in retrospect, makes his intentions clear. Shaikin was so upset about being forced out of his business in early 2014 that he and Hurbace conducted yet another burglary to loot the funds Shaikin had been self-looting for years. A new trial on all counts is warranted. The task of this court, or any United States District Court, is to ensure that justice is served. Justice would not be served by denying this Motion.

...

1 These defendants have also made an analysis of which counts should also garner a new
2 trial should the court not find the Toda Raba letter and audio tape worthy of a new trial.

3 Respectfully submitted this 15th day of April 2022.

4 **The Law Offices of Kristina Wildeveld & Associates**

5 */s/ Lisa A. Rasmussen*
6

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9 **Hill Law Firm**

10 */s/ Daniel J. Hill*
11

12 DANIEL J. HILL, ESQ.
13 Nevada Bar No. 12773
Attorneys for Larry McDaniel

14 **CERTIFICATE OF SERVICE**

15 I HEREBY CERTIFY that I served a copy of the foregoing JOINT MOTION FOR
16 NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE, along with all of its Exhibits
17 and Declarations, upon the following persons via CM/ECF on this 15th day of April 2022:
18

19 Mr. Tony Lopez, AUSA

20 Ms. Mina Chang, AUSA

21 Mr. Ozzie Fumo, Esq.

22 Ms. Kendall Stone, Esq.

23 Mr. Thomas Pitaro, Esq.

24
25 */s/ Lisa A. Rasmussen*
26

27 LISA A. RASMUSSEN, ESQ.
28